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In the Supreme Court of the United States

OCTOBER TERM, 1985

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to qualified immunity from damages liability so long as their conduct does not violate clearly established constitutional rights. In this case, the court of appeals held that petitioner was not entitled to qualified immunity for his warrantless entry of respondents' residence, because it was clearly established that the warrantless entry of a house is unlawful in the absence of exigent circumstances.

The question presented is the following: When the general legal rule relevant to the constitutionality of an official's behavior makes reference to the circumstances of the particular case, is the qualified immunity provided by *Harlow* overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him.

PARTIES TO THE PROCEEDING

The petitioner is Russell Anderson. The respondents are Robert E. Creighton, Jr., and Sarisse Creighton, the plaintiffs in this case who brought suit on their own behalf and on behalf of their children, Shaunda Creighton and Tiffany Creighton.

The City of St. Paul and St. Paul police officers John J. DeNoma, Kevin T. Daniels, Robert C. Ashton, John J. Gelao, William A. Snyder, and Jerome P. Stephan were defendants in the district court, but their cases were remanded to state court and they did not appear in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Russell Anderson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 766 F.2d 1269. The opinion of the district court (App., *infra*, 18a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1985. A petition for rehearing was denied on October 15, 1985 (App., *infra*, 27a). On January 4, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including March 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Shortly before 3:30 p.m. on Veterans Day, November 11, 1983, the Minnesota Federal Savings and Loan in St. Paul, Minnesota, was the subject of an armed robbery. App., *infra*, 19a. Petitioner, a special agent of the Federal Bureau of Investigation (FBI), was contacted at home and immediately went to the bank to begin his investigation. Petitioner arrived at roughly 4:30 p.m., and, along with two other FBI agents and St. Paul police officers, interviewed several eyewitnesses to the robbery. From persons who were at the scene of the robbery and who were in the neighborhood, petitioner learned that the robber had used a getaway car that was described as burgundy or maroon and silver in color, possibly darker and possibly a Buick. From a teller, petitioner also obtained a description of the bank robber, whom petitioner believed was Vadaain Dixon. At 6:30 p.m., petitioner went to a local police station, where he helped prepare a photographic display for the two bank tellers who had seen the robber. The tellers arrived at 7:30 p.m., and a half-hour later each teller independently and positively identified Dixon as the bank robber by selecting his photograph from a 12-photo display. App., *infra*, 19a, 20a; Affidavit of Russell Anderson para. 2-8, at 1-5 (Apr. 16, 1984).[1]

Petitioner was familiar with Vadaain Dixon, because Dixon had a long history of armed robbery and violence dating back to 1974.[2] Dixon had been arrested in May 1983 and charged with committing seven bank robberies,

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[1] Several days later, an accomplice to the robbery was arrested and gave a statement naming Vadaain Dixon as the robber. App., *infra*, 19a n.1; Affidavit of Russell Anderson para. 7, at 3.

[2] For example, in August 1979, shortly after being released from state prison, Dixon robbed a liquor store in St. Louis Park, Minnesota, and took a hostage at gunpoint. Affidavit of Russell Anderson para. 9, at 5-6.

one of which occurred in the Twin Cities area, and he had pleaded guilty in October 1983 to four of those robberies. Following the entry of his guilty pleas and pending the completion of a presentence investigation, Dixon had been assigned to the Volunteers of America half-way house, where he was permitted daily four-hour furloughs. However, Dixon did not return to the half-way house by 6:00 p.m. on November 9, 1983, and a warrant for his arrest issued. App., *infra*, 19a-20a; Affidavit of Russell Anderson para. 7, at 3-4, para. 9, at 5-6; Affidavit of William Johnson para. 4, at 2, para. 6, at 3 (June 4, 1984).

From his investigation of Vadaain Dixon's robberies, petitioner also knew that Dixon had used an accomplice in each of the four robberies to which he had pleaded guilty, and that Dixon's wife Cheryl had admitted driving the getaway car on two of those occasions. Moreover, petitioner had been informed by Dixon's probation officer that Cheryl Dixon had been residing at the home of respondents Robert and Sarisse Creighton, Vadaain Dixon's sister, from the time of the arrest in May 1983, for one of the bank robberies charged against Vadaain Dixon, until November 9, 1983. While there, Cheryl Dixon often used the Creightons' car to drive her husband to and from the half-way house so that they could spend his daily furloughs together at the Creightons' residence. App., *infra*, 20a; Affidavit of Russell Anderson para. 7, at 3-4, para. 12, at 7; Affidavit of William Johnson paras. 5-6, at 2-3.

After the bank tellers identified Vadaain Dixon, petitioner and the police officers decided that Dixon should be apprehended as swiftly as possible, given his history of violence. Petitioner and the police officers immediately proceeded to the home of Dixon's mother, Iris.[3] With her

[3] Her home was closer to the police station and to the bank than the Creightons' house, and Vadaain Dixon's brother Jamie, who had once helped Vadaain and Cheryl Dixon escape after a prior robbery, was staying there. App., *infra*, 20a-21a & n.2.

consent, petitioner and the police officers searched for Dixon, unsuccessfully. Dixon's brother Jamie, who was there at the time, told petitioner that the Creightons owned a red Oldsmobile and said that Vadaain Dixon might be at their grandmother's home. Because the grandmother's home was en route to the Creightons, petitioner and the police went there next, but they again did not find Vadaain Dixon. In the meantime, the local police confirmed from a computer check that the Creightons owned a burgundy or maroon Oldsmobile, which was similar to the getaway car used in the bank robbery. App., *infra*, 20a-21a & n.2; Affidavit of Russell Anderson paras. 10-12, at 6-7.

At approximately 8:40 p.m., petitioner and the police officers arrived at the Creightons' home. The facts are in dispute regarding what transpired at the Creightons' home during the ensuing search for Vadaain Dixon.[4] However, several facts are uncontested. During the course of the search, respondent Sarisse Creighton and her children became quite distraught. App., *infra*, 2a-4a, 21a. Respondent Robert Creighton was struck by a St. Paul policeman, was arrested for obstructing legal process, and was released the following day without being charged with an offense. *Id.* at 3a-4a, 22a. Petitioner had nothing to do with the incident in which Robert Creighton was injured. *Id.* at 22a, 24a n.4.[5] And neither Vadaain nor Cheryl Dixon was found at the Creightons' home.

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[4] Compare Affidavit of Russell Anderson paras. 14-18, at 8-10, with Affidavit of Robert Creighton, Jr. 2-3 (May 30, 1984); Affidavit of Iris Dixon 4-5 (May 30, 1984); Affidavit of Sarisse Creighton 2-6 (May 30, 1984).

[5] According to petitioner, respondent Robert Creighton provoked a St. Paul police officer by attempting to grab his weapon. App., *infra*, 22a; Affidavit of Russell Anderson para. 16, at 9. According to respondent Robert Creighton, the police officer's assault was unprovoked. App., *infra*, 3a; Affidavit of Robert Creighton, Jr. 2-3. However, since this appeal involves only the question of petitioner's

2. Respondents later brought suit in state court against petitioner and several other defendants,[6] claiming, inter alia, that the officers' warrantless entry into their house violated the Fourth Amendment, and seeking damages from petitioner and the other defendants under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and 42 U.S.C. 1983. After removing this suit to federal court, petitioner moved for summary judgment on the ground that he was entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because his warrantless entry was not clearly established as unlawful under the circumstances. The district court granted petitioner's motion, ruling that his warrantless entry into the Creightons' house did not violate the Fourth Amendment. App., *infra*, 23a-26a.

Focusing on the facts of this case as known by petitioner, the district court held that petitioner had probable cause to believe that Vadaain Dixon had robbed the St. Paul bank[7] and that Dixon was at the Creightons' residence.[8] App., *infra*, 23a. The court also held that peti-

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entitlement to qualified immunity on the charge of unlawful entry, the facts concerning what transpired during the actual search of the Creightons' home are irrelevant.

[6] Repondents Robert and Sarisse Creighton brought this suit in their own behalf and on behalf of their children against petitioner, the City of St. Paul, several identified St. Paul police officers, and others unknown to them.

[7] In making this ruling, the district court relied on the witnesses' description of the robber, the tellers' identification of Vadaain Dixon from the photo display, and Dixon's past criminal activity and current fugitive status. App., *infra*, 23a.

[8] The district court relied on the following facts: the probation officer who was performing Dixon's presentence investigation had told petitioner that Dixon's wife had said that she was residing with the Creightons and was using their car; Vadaain Dixon himself had admitted that his wife was living with the Creightons and used their car so that they could spend his furloughs together; petitioner knew that

tioner's warrantless search was lawful because there were exigent circumstances justifying an immediate entry into the Creightons' home to arrest Dixon and to prevent him from disposing of evidence of the robbery. *Id.* at 23a-24a & nn.3-4.[9] Finally, relying, inter alia, on *Warden* v. *Hayden*, 387 U.S. 294 (1967), the court held that petitioner's warrantless entry was lawful because at the time that he entered the Creightons' residence he was still in "hot pursuit" of Dixon (App., *infra*, 24a-25a).[10] Accordingly, the

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Dixon's wife had been his accomplice on past occasions; and Dixon's brother had told petitioner that the Creightons owned a burgundy or red car that matched the description of the getaway car used in the robbery, a fact confirmed by the St. Paul police from a computer check. App., *infra*, 23a.

[9] In so ruling, the district court relied on the following factors, first identified by the District of Columbia Circuit in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (1970) (en banc), and previously applied by the Eighth Circuit in *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (1978), as considerations in determining whether the warrantless entry of a home to arrest a suspect is permissible: (1) armed robbery is a grave offense; (2) Vadaain Dixon was reasonably believed to be armed and dangerous, given his past record and his status as fugitive; (3) petitioner had probable cause to believe that Dixon had committed the bank robbery; (4) petitioner had probable cause to believe that Dixon was at the Creightons' home; (5) it was likely that Dixon would escape if he were not swiftly apprehended, given his status as a fugitive, his access to an automobile, and his proceeds from the robbery; and (6) petitioner's initial entry into the Creightons' home was peaceful, and the violent acts, which petitioner was not alleged to have committed, occurred after the entry. App., *infra*, 23a-24a & nn. 3-4.

[10] As the district court explained, petitioner entered the Creightons' house only 40 minutes after the bank tellers had identified Vadaain Dixon as the robber, and petitioner's entry was the culmination of his continuous efforts to identify the robber and to locate Dixon once he had been identified. App., *infra*, 25a.

~~finally, the~~ court held that petitioner was entitled to qualified immunity under *Harlow*, because his warrantless entry did not violate the Fourth Amendment. *Id.* at 25a & n.5.[11]

3. The court of appeals reversed and remanded the case for trial (App., *infra*, 1a-17a). At the outset, the court of appeals held that the district court erred in granting summary judgment for petitioner regarding the lawfulness of his entry into the Creightons' residence, on the ground that there were disputed questions of material fact whether petitioner had probable cause to believe that Dixon was at the Creightons' house. *Id.* at 7a-12a.[12] The court also

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[11] The district court also dismissed the 42 U.S.C. 1983 claim against petitioner, on the ground that he did not act under color of state law, as well as the 42 U.S.C. 1985 claim against petitioner, on the ground that respondents had not pleaded the requisite class-based animus. App., *infra*, 26a. In addition, the court dismissed the state law tort claims against petitioner. *Ibid.* Finally, the court granted the motion filed by the remaining defendants to remand the case to state court. *Ibid.* Respondents did not appeal these aspects of the district court's order. *Id.* at 5a.

[12] The court of appeals found that petitioner's description of the getaway car was ambiguous at best and, when construed in repondents' favor, described "a two-tone red *and* silver car" (App., *infra*, 9a (emphasis in original)), while respondents owned a solid maroon car. The court also credited respondents' claim that discovery would have shown that a local newspaper had reported the following day that the FBI stated that no getaway car had been seen and that the St. Paul police asked one of their neighbors about a red and silver car with yellow license plates, whereas the Creightons' car had white-and-blue plates. *Ibid.* Second, the court criticized petitioner for not obtaining a search warrant the day before the robbery, since he then knew that Vadaain Dixon had jumped his bond. *Id.* at 10a. Moreover, the court credited respondents' affidavits that Cheryl Dixon had not resided with them since the summer of 1983. *Id.* at 11a. The court also stated that petitioner should have been skeptical regarding the truth of Vadaain and Cheryl Dixon's statements to her husband's probation officer that she was living with respondents and using their car. *Id.* at 11a-12a. Finally, the court stated that the information known to petitioner suggested that Cheryl Dixon had been living at the Creightons' house only up to November 1, not November 11. *Id.* at 12a.

found that the hot pursuit exception to the warrant requirement was not applicable, because petitioner was not in continuous pursuit of Dixon from the time that the robbery occurred (*id.* at 12a-13a), and the court found no evidence to support the claim that a warrantless entry was necessary to prevent the destruction of evidence (*id.* at 13a-14a). Finally, the court ruled that the exigent circumstances exception did not apply, because there were disputed facts as to whether petitioner had a " 'strong reason' " to believe that Dixon was at the Creightons' house, whether Dixon would escape if not immediately apprehended, and whether the entry was peaceful. *Id.* at 14a-15a.

In a brief discussion of the question, the court of appeals also held that petitioner was not entitled to qualified immunity, since it was clearly established that the warrantless entry of a home was unlawful in the absence of exigent circumstances. App., *infra*, 15a-17a. The court explained that " 'if the law was clearly established, the immunity defense ordinarily should fail[,] since a reasonably competent public official should know the law governing his conduct' " (*id.* at 16a (quoting *Harlow*, 457 U.S. at 818-819)). Then, adverting to its earlier discussion of the lawfulness of petitioner's entry, the court held that "the Creightons' fourth amendment rights and the 'exigent circumstances' doctrine were 'clearly established' " at the time of petitioner's entry (App., *infra*, 16a) and that "[petitioner] has cited no persuasive reason why he could reasonably have been unaware of this clearly established law" (*id.* at 17a). Accordingly, without undertaking to decide whether petitioner's own actions were clearly unlawful under well-established law, the court of appeals held that he was not entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

This case present an important, unsettled, and recurring question concerning the proper standard for resolving a claim of qualified immunity by public officials in general, and by law enforcement officers in particular. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that a public official is entitled to immunity from liability in damages when his conduct is objectively reasonable as measured by reference to clearly established law. In this case, the court of appeals held that the only inquiry required by *Harlow* is simply whether the general principles of law governing a police officer's actions—such as probable cause and exigent circumstances—were clearly established at the time in question and that no consideration of the lawfulness of the police officer's own conduct in the case at hand is necessary or permissible. The court of appeals altogether refused to undertake this latter inquiry, ending its analysis once it concluded that the warrantless entry of a home was forbidden in the absence of exigent circumstances and that this principle was clearly established at the time of petitioner's entry.

That ruling, which conflicts with decisions of this Court and several other courts of appeals, nullifies the qualified immunity defense in the situations that will most frequently arise and in which the defense is most necessary: *i.e.*, when the application of a settled rule of law to the particular facts confronting a law enforcement officer is problematic. This Court recognized the significance of this question by granting certiorari to decide it in *Whitley* v. *Albers*, No. 84-1077 (Mar. 4, 1986), but the Court did not reach the question, because it resolved the case on other grounds (slip op. 15). Accordingly, review here is clearly warranted.

1. The court of appeals held that petitioner was not entitled to qualified immunity because it was clearly established at the time that he entered the Creightons' resi-

dence that a warrantless entry of a home was unlawful in the absence of probable cause and exigent circumstances. However, the court of appeals did not determine whether petitioner's own conduct was clearly unlawful; instead, the court resolved this issue simply by reference to the general Fourth Amendment principles set forth by that court and this one. In so ruling, the court of appeals seriously misread this Court's decisions and misapplied the principles governing the qualified immunity defense.

a. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to immunity from damages liability so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known. See also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18. The focus of the inquiry, the Court explained, should be on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." 457 U.S. at 818 (footnote omitted). The Court's subsequent decisions in *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), and *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), make clear that the existence of a general legal standard serves only as the beginning of the analysis under *Harlow*, not the end, and that the approach followed by the court of appeals was in error.

The question in *Davis* was whether the failure of state officials to provide a state employee with a hearing before he was discharged violated his clearly established due process rights. In ruling that the officials were entitled to qualified immunity, the Court acknowledged that its prior decisions had required " 'some kind of a hearing' " in this setting (slip op. 8 n.10 (citation omitted)), but found that the employee's right to a pretermination hearing was not clearly established since "the Court had not determined what kind of a hearing must be provided" or "specif[ied]

any minimally acceptable procedures for termination of employment" (*ibid.*). Examining the procedures actually afforded to the discharged employee, the Court found that the state officials were "[n]o[t] * * * unreasonable" in concluding that the discharged employee received what due process demanded. *Id.* at 8. *Davis* thus makes clear that the existence of a general legal standard does not resolve the qualified immunity analysis under *Harlow* and that the lawfulness of the defendant's conduct in the particular situation at issue must be clearly established for an immunity defense to fail.

Malley v. *Briggs, supra*, confirms that conclusion. There, in rejecting the contention that a police officer is entitled to absolute immunity for an arrest based on a warrant, the Court reaffirmed that under *Harlow* a police officer is entitled to qualified immunity "if [he] acted in an objectively reasonable manner" (*Malley*, slip op. 5), which must be resolved by reference to the facts and circumstances confronting the official (*ibid.*). Moreover, *Malley* expressly held that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in [*United States* v. *Leon*, No. 82-1771 (July 5, 1984)] defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest" (*Malley*, slip op. 8 (footnote omitted)), and the Court's decision in *Leon* requires an analysis of the facts known to the officer himself (see *Leon*, slip op. 27).[13] As the Court in *Malley* summarized

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[13] *Leon* held that evidence seized under an invalid search warrant should not be suppressed at trial because, on the facts of that case, "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable." Slip op. 27. As the Court explained, the "application for a warrant clearly was supported by much more than a 'bare bones' affidavit," which, in turn, "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Ibid.*

(slip op. 5): "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." See also *Mitchell* v. *Forsyth*, slip op. 23 n.12 (noting that, although a public official will not be immune simply because the warrant requirement has not previously and expressly been held applicable in identical circumstances, "in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law"). *Malley* therefore demonstrates that the court of appeals erred by failing to determine whether petitioner should have known that his warrantless entry into the Creightons' home was clearly unlawful.[14]

b. That conclusion is fully consistent with—in fact, it is compelled by—the principles underlying the qualified immunity doctrine. "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974); see also *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); *Chagnon* v. *Bell*, 642 F.2d 1248, 1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981). When a general principle of law is not clearly established, *Harlow* provides that a government official cannot be saddled with personal liability, because an official "[cannot] reasonably be

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[14] The Court's judgment in *Malley* also makes this clear. In remanding the case for further proceedings, the Court expressly held that "whether [the officer's] conduct *in this case* was in fact objectively reasonable * * * must be resolved on remand." Slip op. 9 n.8 (emphasis added).

expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful" (457 U.S. at 818). See also *Forsyth*, slip op. 22-23; *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) ("a police officer is not charged with predicting the future course of constitutional law"). The same considerations also apply when the question is how a court will apply a general legal standard to the particular facts confronting a government official.

The broad standards contained in the constitutional text—such as "due process," "equal protection," or "cruel and unusual punishment"—do not by themselves necessarily provide sufficient guidance to a public official to conform his conduct to constitutional requirements, even when there is no dispute that those standards are themselves firmly established. If the establishment of a general legal standard were by itself sufficient to deprive a public official of qualified immunity, an official would often have no way of knowing whether his decisions might later provide the basis for a suit for damages. Imposing damages liability on a public official in those circumstances would force him to make the same type of prediction that *Harlow* found to be unwarranted when the general rule of law was not itself clear. Moreover, the imposition of damages liability on a public official simply because he has trespassed on an already-existing, but abstract, general legal standard would eliminate the qualified immunity defense in every case in which there is a "legitimate question" (*Forsyth*, slip op. 23 n.12) or a "reasonable * * * disagree[ment]" among public officials (*Malley*, slip op. 5) regarding how the courts will apply that standard to a particular set of facts. That result would "disrupt the balance * * * between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis*, slip op. 11. As the Court has recognized, "[t]he imposition of

monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving" the public interest (*Wood* v. *Strickland*, 420 U.S. at 319-320). It would, instead, "contribute not to principled and fearless decision-making but to intimidation" (*Pierson*, 386 U.S. at 554)—the very result that qualified immunity has always been designed to prevent. See *Harlow*, 457 U.S. at 818-819; *Procunier*, 434 U.S. at 562; *Wood*, 420 U.S. at 319. The court of appeals' truncated approach to the question whether petitioner was entitled to qualified immunity would lead to these unfortunate results.

c. The importance, in resolving a qualified immunity claim, of focusing on the application of a general principle of law to the specific conduct at hand is particularly evident where a law enforcement officer is alleged to have violated the Fourth Amendment. Law enforcement officers normally are not trained legal technicians, yet they are expected to make quick decisions, often involving complicated legal issues, " 'in the midst and haste of a criminal investigation' " (*Malley*, slip op. 5 (Powell, J., concurring in part and dissenting in part) (citation omitted)) that can take place in "rapidly unfolding and often dangerous situations on city streets" (*Terry* v. *Ohio*, 392 U.S. 1, 10 (1968)). Countless officers in the field must make daily decisions under difficult circumstances and without the opportunity for reflection that the courts will have if a suit is later brought against the officer. The legal questions that stem from the actions that a police officer must take "[i]n a kaleidoscopic situation * * * where spontaneity rather than adherence to a police manual is necessarily the order of the day" (*New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 6) can easily leave room for disagreement among the judges who must later

resolve these matters. Where that is true, there is no basis for faulting an officer who made a reasonable but erroneous judgment regarding the existence of probable cause or exigent circumstances. See *Malley*, slip op. 5; *id.* at 4-5 (Powell, J., concurring in part and dissenting in part).

The refinement of the broad standards set forth in the text of the Fourth Amendment by the decisions of this Court and the lower courts often provide even a reasonably well-trained officer with little more than general guidance in deciding how to exercise his judgment in carrying out his enforcement responsibilities in a manner consistent with constitutional requirements. Many of the decisions that a police officer must make on a daily basis, such as whether to stop and question a suspect, can only be resolved by applying general Fourth Amendment principles on a case-by-case basis to the particular facts at hand. See, *e.g.*, *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 10 ("[m]uch as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria"). Even a "reasonably competent officer" (*Malley*, slip op. 5) may find it difficult correctly to assess the facts in light of the governing law in the highly-charged situations that he must confront.

The legal standards discussed by the courts below—probable cause and exigent circumstances—well illustrate this point. "[P]robable cause," the Court has noted, "is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules" (*Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). Whether a police officer has probable cause to make an arrest depends on "whether at that moment the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy

information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense" (*Beck* v. *Ohio*, 379 U.S. 89, 91 (1964)). In addition, although the warrantless entry of a home is presumptively unlawful (see, *e.g.*, *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 8; *Payton* v. *New York*, 445 U.S. 573, 586 (1980)), it is also the case that "exigent circumstances" will justify an immediate entry to arrest a suspect (see, *e.g.*, *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967); see generally *Welsh* v. *Wisconsin*, 466 U.S. 740, 749-750 (1984)) and that, by definition, the question whether there are exigent circumstances in a given case cannot be answered without assessing the facts as they reasonably appeared to the responsible officer. This Court's decisions in *Santana* and *Hayden* found that an immediate entry was justified under the circumstances of each case, but did not provide a comprehensive test for measuring the existence of exigent circumstances. 427 U.S. at 42-43; 387 U.S. at 298-299. Similarly, the lower courts have recognized that there can be no bright-line answer to the question whether a warrantless entry to arrest a suspect is permissible and have developed different approaches to this question.[15] In sum, the question whether there are

[15] Several courts, including the Eighth Circuit, have followed the approach first set forth in *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc), "a leading federal case defining exigent circumstances" (*Welsh*, 466 U.S. at 751), which identified several factors (see App., *infra*, 14a-15a n.7, 24a n.3) to be considered in making this determination. See, *e.g.*, *United States* v. *Baldacchino*, 762 F.2d 170, 176-177 (1st Cir. 1985); *United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 100-102 (2d Cir. 1982); *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978); *United States* v. *Shye*, 492 F.2d 886, 891-892 (6th Cir. 1974); *Salvador* v. *United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *Vance* v. *North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970). On other occasions, courts have cautioned against adopting a " 'checklist-type [of] analysis' " (*Llaguno* v. *Mingey*, 763 F.2d 1560,

exigent circumstances, like the question whether there is probable cause, cannot be resolved simply by virtue of the fact that a general standard exists. It is therefore hardly surprising that in such cases "[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting).

Under the court of appeals' ruling, however, police officers are not free from the threat of liability and litigation unless they correctly assess how a court will resolve the merits of any Fourth Amendment question that may arise. Even if a police officer reasonably believes that his conduct is lawful under clearly established law—as petitioner believed here—his claim to qualified immunity will be defeated upon nothing more than a showing that he trespassed upon a general principle of law. That result is wholly unjustified. Denying a police officer the benefit of qualified immunity simply because a general standard such as probable cause or exigent circumstances is clearly established would put him in the "unhappy" dilemma of

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1564 (7th Cir. 1985) (en banc)), but even then the courts have recognized that a bright-line rule is not possible. *Ibid.* ("[t]he operative word in the Fourth Amendment is 'unreasonable'; so the question ought to be, were the police unreasonable in not getting a warrant in the circumstances that confronted them?"). Compare LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Ref. 417, 454-458 (1984). In still other situations, the courts have looked to the facts of the case at hand to determine whether an warrantless entry was "imperative" (*McDonald* v. *United States*, 335 U.S. 451, 456 (1948)). See, *e.g.*, *United States* v. *Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983); *United States* v. *Hultgren*, 713 F.2d 79 (5th Cir. 1983); *United States* v. *Titus*, 445 F.2d 577, 578-579 (2d Cir.), cert. denied, 404 U.S. 957 (1971).

"choos[ing] between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson*, 386 U.S. at 555.

Nor can it be said that petitioner's conduct in this case was so obviously unlawful that an examination of the facts known by him to be true was unnecessary. Petitioner clearly had probable cause to believe that Vadaain Dixon was responsible for the bank robbery. Dixon had a history of armed robbery and had pleaded guilty to four armed bank robberies only one month earlier; he fit the bank tellers' description of the robber, and two tellers had positively identified him from a photo display. The district court's finding in this regard (App., *infra*, 23a) was not disturbed by the court of appeals. Moreover, the district court also found that petitioner had probable cause to believe that Vadaain Dixon was at the Creightons' home. *Ibid.*[16] Petitioner had been told by Vadaain Dixon's probation officer that Dixon and his wife Cheryl had both admitted that she was living at the Creightons' home and that Cheryl had been using their car on a daily basis to pick up her husband at the halfway house and take him to the

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[16] Although the court of appeals ruled that there was a factual dispute on this issue (App., *infra*, at 7a-12a), that court's ruling in this regard was in error. Whether there is probable cause turns on the facts reasonably believed by an officer at the time of the arrest, even if those facts may turn out in part to be wrong. See, *e.g.*, *Illinois* v. *Gates*, 462 U.S. at 231-235, 245 n.14; *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978); *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); 1 W. LaFave, *Search and Seizure* § 3.2, at 466 (1978). Accordingly, the court of appeals' reliance on facts that were not known to petitioner at the time of his entry, such as the newspaper report the following day or the conversation between one of the local police officers and respondent's neighbor (App., *infra*, 9a), were immaterial, as the district court ruled (*id.* at 25a n.5).

Creightons' home. Furthermore, the description of the getaway car, even if not precisely identical to the Creightons' car, was a legitimate factor for petitioner to consider, particularly when coupled with Vadaain and Cheryl Dixons' statements as to her whereabouts. Finally, relying on the factors previously applied by the Eighth Circuit in *United States* v. *Kulcsar,* 586 F.2d 1283, 1287 (1978), the district court ruled that there were exigent circumstances that justified petitioner's warrantless entry. App., *infra,* 23a-24a. The district court's ruling that petitioner's conduct did not violate the Fourth Amendment is entitled to substantial weight on the qualified immunity issue.

2. The lower courts are in disarray as to the correct approach to the resolution of a qualified immunity claim. Contrary to the court below, several other courts of appeals have held that the inquiry under *Harlow* does not end with the finding that a general principle of law was well-established, but continues until the court determines whether, in the circumstances of the case, the defendant should have known that his own conduct was unlawful. For example, in *Floyd* v. *Farrell,* 765 F.2d 1, 5 (1st Cir. 1985), the court held that "a police officer should not be found liable under [42 U.S.C.] § 1983 for a warrantless arrest because the presence of probable cause was merely questionable at the time of the arrest" (*id.* at 5) and that "so long as the presence of probable cause is at least arguable," the officer is entitled to immunity (*ibid.*). In resolving that inquiry, the court held, "the question we must ask is whether another officer, standing in [the defendant's] shoes and having the same information [the defendant] had, would reasonably have come to the conclusion that he had probable cause to arrest [the suspect]" (*ibid.*). Similarly, in *Briggs* v. *Malley,* 748 F.2d 715, 719 (1st Cir. 1984), aff'd, No. 84-1586 (Mar. 5, 1986), which

concerned a police officer's liability for obtaining an arrest warrant, the court expressly held that the qualified immunity issue must be resolved by reference to the facts known by the officer. As the court held, "*only* where an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach. Where the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." 748 F.2d at 721 (emphasis in original). See also *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, No. 84-1139 (Mar. 25, 1985) (emphasis in original) (recognizing that an interpretation of *Harlow* requiring only that broadly defined rights be clearly established "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic").[17]

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[17] See also, *e.g.*, *LeSavage* v. *White*, 755 F.2d 814, 821 (11th Cir. 1985) ("[t]he question of qualified immunity under *Harlow* is one of reasonableness – would a reasonable person in [the defendant's] shoes have known he was violating [the plaintiff's] constitutional rights?"); *Zook* v. *Brown*, 748 F.2d 1161, 1165 (7th Cir. 1984) (defendants were entitled to qualified immunity for disciplining of a public officer for endorsing a local ambulance service since the application of the First Amendment to the particular facts of the case was unclear); *Evers* v. *County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984) (individual defendants entitled to qualified immunity for declaring that a certain road, claimed by a private party to be her property, was public, because it was not clear that due process required notice and a hearing before a declaration that a road is public can issue); *Bailey* v. *Turner*, 736 F.2d 963, 969-972 (4th Cir. 1984) (prison guard entitled to a jury instruction on qualified immunity in connection with his use of mace on a prisoner because there was no per se rule forbidding its use); *O'Hagan* v. *Soto*, 725 F.2d 878, 879 (2d Cir. 1984) (police officer entitled to qualified immunity for questioning a suspect in the absence of counsel because it was not clearly established whether the suspect had a Sixth Amendment right to counsel at the time of the questioning).

By contrast, other courts have rejected an immunity claim on the ground that the legal standard was clearly established, without determining whether the application of that standard to the particular facts of the case was also clear. See *Bass* v. *Wallenstein*, 769 F.2d 1173, 1186 (7th Cir. 1985) (holding that defendants were not entitled to immunity because the Eighth Amendment standard of "deliberate indifference to inmates' serious medical needs" was clearly established at the pertinent time); *Fujiwara* v. *Clark*, 703 F.2d 357, 361 (9th Cir. 1983) (denying qualified immunity because "[t]he law governing the conduct of Appellees was then clearly established"); see also *Trejo* v. *Perez*, 693 F.2d 482, 488 n.10 (5th Cir. 1982) (emphasis in original) (stating that "[t]he Fourth Amendment rule on warrantless arrests *is* 'clearly established law.' If an arrest lacks probable cause for its support, it is, objectively speaking, in violation of clearly established law."). This confusion among the circuits warrants resolution by this Court.[18]

[18] As noted above, this question was presented in *Whitley* v. *Albers*, slip op. 15, but the Court did not reach it.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MARCH 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5150

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, APPELLANTS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, APPELLEE.

JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: February 12, 1985

Filed: July 12, 1985

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The issue in this appeal is whether the district court erred in granting Federal Bureau of Investigation Agent Russell Anderson's motion for summary judgment on the

Creightons' claim that Anderson's warrantless search of their home at night violated their rights under the fourth amendment to the United States Constitution. For the reasons set forth below, we reverse and remand.

I. FACTS.

Because this case was dismissed on Anderson's motion for summary judgment, we set out the facts in the light most favorable to the Creightons and draw all inferences from the underlying facts in their favor.[1] *Adickes* v. *Kress & Co.*, 398 U.S. 144, 158-59 (1970). On the night of November 11, 1983, Sarisse and Robert Creighton and their three young daughters were spending a quiet evening at their home when a spotlight suddenly flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, by his account (as verified by a St. Paul police report), one of the officers told him to "keep his hands in sight" while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, "We don't have a search warrant [and] don't need [one]; you watch too much TV."

Mr. Creighton asked the officers to put their guns away because his children were frightened, but the officers refused. Mrs. Creighton awoke to the shrieking of her children, and was confronted by an officer who pointed a shotgun at her. She allegedly observed the officers yelling at her three daughters to "sit their damn asses down and

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[1] In compliance with Fed. R. Civ. P. 56(e), the Creightons opposed Anderson's affidavits and exhibits with several affidavits and exhibits. The Creightons also filed an offer of proof alleging what they could prove through limited discovery.

stop screaming." She asked the officer, "What the hell is going on?" The officer allegedly did not explain the situation and simply said to her, "Why don't you make your damn kids sit on the couch and make them shut up."

One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun, even though Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person. Shaunda, the Creighton's ten-year-old daughter, witnessed the assault and screamed for her mother to come help. She claims that one of the officers then hit her.

Mrs. Creighton phoned her mother, but an officer allegedly kicked and grabbed the phone and told her to "hang up that damn phone." She told her children to run to their neighbor's house for safety. The children ran out and a plain clothes officer chased them. The Creightons' neighbor allegedly told Mrs. Creighton that the officer ran into her house and grabbed Shaunda by the shoulders and shook her. The neighbor allegedly told the officer, "Can't you see she's in shock; leave her alone and get out of my house." Mrs. Creighton's mother later brought Shaunda to the emergency room at Children's Hospital for an arm injury caused by the officer's rough handling.

During the melee, family members and friends began arriving at the Creightons' home. Mrs. Creighton claims that she was embarrassed in front of her family and friends by the invasion of their home and their rough treatment as if they were suspects in a major crime. At this time, she again asked Anderson for a search warrant. He allegedly replied, "I don't need a damn search warrant when I'm looking for a fugitive." The officers did not discover the

allegedly unspecified "fugitive" at the Creightons' home or any evidence whatsoever that he had been there or that the Creightons were involved in any type of criminal activity. Nonetheless, the officers then arrested and handcuffed Mr. Creighton for obstruction of justice and brought him to the police station where he was jailed overnight, then released without being charged.

The Creightons claim that it was not until during or shortly after the melee that they learned the officers were looking for Vadaain Dixon, Mrs. Creighton's brother, who, unbeknownst to the Creightons, was a suspect in an armed robbery committed several hours earlier that afternoon. They learned that the officers, before arriving at the Creightons' home, had made warrantless searches of the home of Iris Dixon, the mother of Vadaain Dixon and Mrs. Creighton, and the home of Minnie Dixon, the grandmother of Vadaain Dixon and Mrs. Creighton. Anderson claims that he had probable cause to search the homes of Vadaain Dixon's relatives, that it would have been too difficult to get a search warrant because it was nighttime on Veteran's Day, and that he believed that exigent circumstances justified the searches without a search warrant.

The Creightons, individually and on behalf of their children, Shaunda and Tiffany Creighton, then brought this action for compensatory and punitive damages against the City of St. Paul, six St. Paul police officers, FBI agent Russell Anderson, and others unknown to them. The Creightons alleged causes of action under the fourth amendment to the United States Constitution pursuant to *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), under 42 U.S.C. §§ 1983 and 1985, and under the tort theories of intentional infliction of emotional distress, assault and battery, false arrest and imprisonment, and negligence. The Creightons brought their action in state court, but it was removed to federal court pursuant to defendant Anderson's petition under 28 U.S.C. §§ 1346 and 1442.

Anderson failed to file an answer, but moved for summary judgment. The district court granted the motion[2] on the theory that Anderson was entitled to qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) because, in substance, his warrantless search of the Creightons' home was reasonable.[3]

II. DISCUSSION.

A. Introduction.

Recently, in *Welsh* v. *Wisconsin,* ____ U.S. ____, 52 U.S.L.W. 4581 (1984), the Supreme Court reiterated:

> It is axiomatic that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." * * * And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. * * * It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York,* 445 U.S., at 586. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 474-475 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show . . . the presence of 'exigent circumstances' "). * * *

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[2] The district court also granted the motion of the remaining defendants to remand to state court. The Creightons do not appeal from this order.

[3] The court set forth additional reasons for summary judgment on the Creightons' sections 1983 and 1985 claims against Anderson, and also dismissed the Creightons' state law tort claims against Anderson. Because the Creightons do not appeal from these holdings, we affirm the district court's dismissal of these claims.

> Consistently with these long-recognized principles, the Court decided in *Payton* v. *New York, supra,* that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. *Id.*, at 583-590. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, *id.*, at 583, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," * * *, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions[.]

Id. at 4584 (citations and footnotes omitted).

The Creightons contend that the trial court committed three errors in granting Anderson's motion for summary judgment. They argue, first, that the court erred in finding as a matter of law that Anderson had probable cause to believe that Vadaain Dixon was in the Creightons' home at the time of the search and that exigent circumstances justified the lack of a warrant; second, that the court erred in applying the law of summary judgment by failing to draw all inferences in favor of the nonmoving party and by granting summary judgment when there were disputed issues of material fact; and third, that the court erred in granting summary judgment before discovery due to a misapplication of *Harlow* v. *Fitzgerald,* 452 U.S. 800 (1982). After reviewing the affidavits and exhibits of both parties in the light most favorable to the Creightons, we agree that Anderson was not entitled to summary judgment because he has not proved "with such clarity as to leave no room for controversy," *Nix* v. *Sweeney,* 573 F.2d

998, 1001 (8th Cir. 1978), *cert. denied,* 444 U.S. 929 (1979), that he had probable cause to believe Vadaain Dixon was in the Creightons' home and that exigent circumstances justified his search without a warrant. The record reveals numerous unresolved factual controversies on the issues of probable cause and exigent circumstances which should be resolved by the jury[4] after the Creightons have been given the opportunity for reasonable discovery.

B. There is an unresolved factual controversy over whether Anderson had probable cause to believe Vadaain Dixon was in the Creighton's home on the night of November 11, 1983.

In *Nix* v. *Sweeney,* 573 F.2d at 1001, we held that:

> In order to prevail on summary judgment [on the issue of probable cause], the evidence, including admitted facts and disputed facts viewed in the light most favorable to the plaintiff, in the knowledge of the police officer ordering the arrest [or search], *must conclusively establish probable cause.* * * * *Conflicting evidence on any issue would make that issue a jury question.* [Emphasis added.]

As we stated in *United States* v. *Taylor,* 428 F.2d 515, 517 (8th Cir.), *cert. denied,* 400 U.S. 956 (1970):

> probable cause to search exists when the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that the property to be seized [or subject of the arrest warrant] *will* be found in a particular place or on a particular person. [Emphasis added.]

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[4] We reject the government's claim that the Creightons waived their right to a jury trial because their motion for jury trial was filed twelve days after the government filed its summary judgment motion.

A mere suspicion that a suspect *might* be in the home of a third party generally will not establish probable cause to search the third party's home. *Steagald* v. *United States,* 451 U.S. 204, 214-15 (1981); *Rice* v. *Wolff,* 513 F.2d 1280, 1293 (8th Cir. 1975), *rev'd on other grounds sub nom. Stone* v. *Powell,* 428 U.S. 465 (1976) (In response to claim that there was probable cause to believe a suspect was in the searched home on a particular day because he had been known to visit the home in the past, the Court held: "Clearly, such speculation is not a reasonable ground justifying the invasion of citizens' privacy.").

The district court determined that the following information gave Anderson probable cause to believe Vadaain Dixon was at the Creightons' home. On the day before the robbery, Probation Officer William Johnson had told Anderson that Cheryl Dixon, Vadaain's wife, told him on November 1st that she was living at the Creightons' and was using their automobile. Vadaain Dixon also told Johnson, on November 1st, that Cheryl was living with the Creightons and that she picked him up by automobile so that they could spend his day furloughs from a halfway house together. Anderson knew Cheryl Dixon had been arrested for acting as Vadaain's accomplice on prior robberies. Finally, Anderson was allegedly informed by Jamie Dixon, Iris Dixon's son, that the Creightons owned a red or burgundy Oldsmobile, a car allegedly matching the description of the car used in the robbery. This was confirmed by computer shortly before or after Anderson spoke with Jamie Dixon.

We agree with the Creightons that these allegations did not justify summary judgment on the probable cause question because there are several issues for the jury on whether these "facts" would have led an officer of reasonable caution to believe that Vadaain Dixon was in the Creightons' home at the time of the search. First, the pleadings, affidavits and exhibits submitted by the

Creightons raise an issue of fact as to whether their automobile matched the description of the car used in the robbery. Anderson's affidavit claims: "I also learned from St. Paul police officers who had interviewed witnesses from the neighborhood that the robber had escaped in a car described as a burgundy or maroon over silver car, possibly a Buick. Other witnesses said it was possibly a darker color." Although this description is ambiguous, if factual inferences are to be drawn in the Creightons' favor, it seems to us that Anderson describes a two-tone red *and* silver car such as the red over silver Buick Riviera. The Creightons own a solid maroon Oldsmobile. It is far from clear and, thus, an issue for the jury, whether the description of a two-tone red-and-silver car, possibly a Buick, is a match with a solid maroon Oldsmobile. In any event, the ambiguous description of the car – if it could be considered a match with the Creightons' car – probably describes a significant portion of all the cars in St. Paul, Minnesota.

Additionally, the Creightons sought, but were denied, discovery on two factual issues which might shed light on the description of the car. First, they contend that a St. Paul newspaper reported that the FBI stated that no car had been seen leaving the bank robbery on November 11, 1983. Second, they contend that the police, shortly after arriving at their home, asked their neighbor about a red *and* silver car with a *yellow* license plate. The Creightons' car apparently had white-and-blue Minnesota plates. Thus, upon further discovery and trial on the facts, the Creightons might show that Anderson either had no description of a getaway car or that if he did, it was a description of a two-tone red-and-silver Buick with yellow license plates. This would not justify a search of the Creightons' home because this description does not match their solid maroon Oldsmobile with white-and-blue plates. Given that Anderson's summary judgment memorandum

claims that the "most important [evidence establishing probable cause] is the fact that the robbery car strongly resembled one owned by the Creightons," the dispute over the identification of the car calls for further factfinding and resolution by the jury.

The second basis for Anderson's alleged probable cause determination was that:

> I knew from my investigations of previous bank robberies committed by Vadaain Dixon that Sarisse Creighton was Vadaain Dixon's sister. I also knew that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had resided with Robert and Sarisse Creighton from May of 1983, after her arrest in Dallas for the Omaha bank robbery, to November 9, 1983, the day Vadaain Dixon jumped his bond. I also knew that Vadaain Dixon has stayed on a daily basis at the house of Robert and Sarisse Creighton with Cheryl Ann Donlin Dixon during his four-hour furloughs from the Volunteers of America residence from October 13 to approximately November 9, 1983.

Before discussing the Creightons' arguments that these claims are untrue and based on unreliable double hearsay, we note their point that defendant Anderson was informed of all these "facts" on November 10, 1983, the day before the search, and one day after Anderson learned that Vadaain Dixon had failed to return to the Volunteers of America halfway house. Because the government bases its argument regarding probable cause and exigent circumstances on these alleged "facts" and on how Vadaain Dixon was a dangerous fugitive, a serious question is raised why these facts did not lead Anderson to obtain a warrant for a search—preferably in the daytime—of the Creightons' home on November 10, 1984.

Recognizing the force of this argument, the government concedes that these alleged "facts" did not establish probable cause that Vadaain Dixon might be at the

Creightons' home. However, they contend that these suspicions amount to probable cause when considered in conjunction with the alleged match of the Creightons' car with the alleged getaway car. We have already discussed the need for more factfinding on the car identification dispute; here, we note that there is substantial force in the Creightons' attack on Anderson's claim that Vadaain Dixon might be at the Creightons because Cheryl Dixon allegedly had lived with the Creightons in the several months preceding the robbery.

First, Sarisse and Robert Creighton's sworn affidavits claim that although Cheryl Dixon had lived with them for two weeks in the summer of 1983, she had not resided at their home at any time thereafter. They also have included in the summary judgment exhibits all of Vadaain Dixon's furlough cards from the Volunteers of America halfway house which contradict Anderson's claim that Vadaain had visited the Creightons on a daily[5] basis from October 13 to November 9, 1983, and support the claim that Cheryl Dixon was not living with the Creightons.

Second, the Creightons claim that Anderson's information is unreliable double hearsay. Anderson alleges that he obtained the information on November 10, 1983, from Federal Parole Officer William Johnson who allegedly obtained it ten days earlier when Vadaain and Cheryl Dixon

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[5] The record contains twenty-seven furlough cards filled out by Vadaain Dixon from October 13, 1983 to November 9, 1983. On October 15, 1983, Vadaain Dixon listed as destinations for his four-hour leave: 1) Iris Dixon; 2) Cheryl Dixon at Creightons; and 3) Janice Robertson. On October 17, 1983, Vadaain listed: 1) Har-Mar Mall; 2) Iris Dixon; 3) Cheryl Dixon at the Creightons; and 4) McDonalds. On October 18, 1983, Vadaain listed: 1) Iris Dixon; and 2) Cheryl Dixon at the Creightons. The Creightons' address is not noted as a possible destination on any of the remaining twenty-four furlough cards. Thus, even if Cheryl Dixon had visited the Creightons for three days and Vadaain had briefly visited her there, Vadaain Dixon's furlough cards show that he had not been at the Creightons for over three weeks prior to the robbery.

allegedly told him that Cheryl was living at the Creightons and occasionally using their car. The Creightons note that even the government admits that Cheryl and Vadaain Dixon are totally untrustworthy and unreliable. They argue it is not implausible the Dixons would have lied to their parole officer that Cheryl was living with a respectable family and attending a nearby beautician's school. This raises an issue for the jury because "if hearsay declarations are used to establish probable cause, the [officer must show that he had] a 'substantial basis' for crediting the hearsay declarations." *People* v. *Love,* 37 CrL 2200, 2201 (Cal. Ct. App. 1985) (citing *Jones* v. *United States,* 362 U.S. 257, 270 (1960); *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965)).

Third, even if Anderson was justified in relying on the information he obtained from Johnson, Anderson is unreasonable in claiming that it showed that Cheryl Dixon was living at the Creightons up to November 9. At best, his information suggested that Cheryl Dixon might have been living at the Creightons' home up to November 1. Moreover, even if one assumes that Cheryl Dixon was living at the Creightons' up to November 9, this does not necessarily show that Vadaain Dixon would have been at the Creightons' on November 11.

In sum, there are significant factual disputes about the truthfulness and quality of the "facts" behind Anderson's alleged probable cause determination. Summary judgment on this issue was unjustified because the government did not "conclusively establish probable cause." *Nix,* 573 F.2d at 1001.

C. There is a question of fact whether exigent circumstances justified Anderson's lack of a search warrant.

The trial court accepted Anderson's three claims why exigent circumstances justified his warrantless search of the Creightons' home. First, the court found that Anderson was in "hot pursuit" of a suspect. This was error because

the evidence does not establish "hot pursuit" as a matter of law.[6] Recently in *Welsh* v. *Wisconsin*, ____ U.S. ____, 52 U.S.L.W. at 4585, the Court held that the police were not in "hot pursuit" of a suspect "because there was no immediate or continuous pursuit of the [petitioner] from the scene of a crime." *See also United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984) (Court upholds motion to suppress evidence, rejecting "hot pursuit" exception because, although the officers followed the suspect from the scene of a crime, they stopped at a coffee shop for approximately twenty minutes to plan the arrest). In *United States* v. *Santana*, 427 U.S. 38, 43 (1976), the Court held that " 'hot pursuit' means some sort of a chase." In the case at hand, no evidence in the record supports a claim that Anderson was in "immediate or continuous pursuit" of Vadaain Dixon or that Anderson was involved in "some sort of a chase." Rather, Anderson had not seen Dixon's getaway car and had, at best, minimal evidence that Dixon might have fled to the Creightons' home. Anderson cites no case which supports a holding as a matter of law that there was "hot pursuit" on facts similar to the case at hand. This issue should be resolved by the jury under proper instructions from the court on the limited situations where "hot pursuit" may be found.

Second, the trial court suggested that, as a matter of law, the possibility of destruction of evidence justified Anderson's lack of a warrant. For this exception to apply, the officer must show that he had some actual and

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[6] We reject Anderson's argument that the Creightons' appeal "should be dismissed because they have not briefed an independent ground for the trial court's ruling, i.e., [that] * * * Anderson was in hot pursuit of an armed and dangerous felon." The Creightons, by arguing that exigent circumstances did not justify the lack of a warrant, have sufficiently raised the point that Anderson was not in "hot pursuit" of a suspect. *See Terry* v. *Ohio*, 392 U.S. 1, 20 (1968) (referring to "hot pursuit" as an example of an exigent circumstance); *Dorman* v. *United States*, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc) (same).

reasonable basis for believing that evidence would be destroyed. *United States* v. *Perez,* 700 F.2d 1232, 1237 (8th Cir.), *cert. denied,* 104 S. Ct. 3587 (1983) ("We have more recently stated that '[t]o justify a warrantless entry based on imminent destruction of evidence, factual circumstances must demonstrate a sufficient basis for an officer to believe somebody in the residence will likely destroy evidence. * * * *Mere fear or apprehension will not justify a warrantless entry of a private home.*' " [Emphasis added and citation omitted.]); *United States* v. *Kulcsar,* 586 F.2d 1283 (8th Cir. 1978); *United States* v. *Moreno,* 701 F.2d 815, 818 (9th Cir. 1983) (Because the possibility of destruction of evidence exists in every case, there must be some evidence to support the suspicion if the lack of a search warrant is to be excused.) As the Creightons point out, Anderson's affidavit does not mention that he feared that evidence would be destroyed. The *post hoc* speculations of Anderson's counsel that Dixon might have destroyed evidence if he had been in the Creightons' home apparently were not factors in Anderson's decision to conduct the search. Moreover, there is no evidence to support the speculation. Accordingly, the trial court erred in finding that the possibility of "destruction of evidence" justified the lack of a warrant. This issue should be resolved by the jury upon proper instructions from the court.

Finally, the trial court found that exigent circumstances existed under the six factor analysis set forth in *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970).[7] *See also,*

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[7] These factors are:

(1) That a grave offense is involved, particularly a crime of violence;

(2) the suspect is reasonably believed to be armed;

(3) a clear showing of probable cause;

(4) a strong reason to believe that the suspect is in the dwelling;

(5) the likelihood of escape if not swifty apprehended;

e.g., United States v. *Kulcsar,* 586 F.2d 1283, 1287 (8th Cir. 1978). We agree with the Creightons that this was error because there is a factual dispute for the jury's resolution on whether exigent circumstances existed under the *Dorman* analysis. It is for the jury to decide whether Anderson had a "strong reason" to believe that Vadaain Dixon was in the Creightons' home at the time of the search, and whether there was a likelihood of Dixon's escape if the search was delayed until a warrant was obtained. *See Wallace* v. *King,* 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied,* 451 U.S. 969 (1981); *United States* v. *Glover,* 555 F. Supp. 604 (D. D.C. 1982), *affirmed,* 725 F.2d 120 (D.C. Cir.), *cert. denied,* 104 S. Ct. 1682 (1984). There is also a disputed issue of fact for the jury on whether Anderson's entry was peaceable. If the Creightons can prove that the officers did not ask for permission to enter and did not explain their mission but simply told Mr. Creighton to "keep his hands in sight" while they entered his home with guns ready, then, on the facts of this case, the jury, could find that the entry was not peaceable.

In sum, we believe that this case calls for additional fact-finding on whether exigent circumstances justified Anderson's lack of a warrant.

III. QUALIFIED IMMUNITY.

Because we have decided that there is a jury question on whether Anderson violated the Creightons' fourth amendment rights, we must reach the question whether Anderson is nonetheless immune from damages under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982).[8]

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(6) a peaceable entry as opposed to a "breaking;" and

(7) the time of entry (night or day).

Dorman, 435 F.2d at 392-93.

[8] Although the trial court believed that it was deciding the *Harlow* issue, it only addressed the question of whether Anderson violated the constitution and never really reached the immunity issue.

In *Harlow*, the Supreme Court held that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Anderson argues that, under *Harlow,* he is entitled to immunity from damages if his conduct was "objectively reasonable." However, this misstates the standard. *Harlow* does not give courts unguided discretion to determine what conduct is or is not objectively reasonable. Instead, the *Harlow* Court stated that the first inquiry of the qualified immunity analysis is whether, assuming that the government defendant violated plaintiffs' constitutional or statutory rights as they are presently defined, did the defendant's conduct "violate *clearly established* statutory or constitutional rights of which a reasonable person would have known" of at the time of the alleged violation? 457 U.S. at 818 (emphasis added). The Court then stated that "if the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19.

Anderson admits he knew that he could not search for Vadaain Dixon in the Creightors' home unless he had probable cause to believe that Dixon was in the Creightons' home and that "exigent circumstances" justified his failure to obtain a warrant. He argues, however, that the meaning of "exigent circumstances" was not clearly established on November 12, 1983. We disagree.

In our previous discussion, we set forth a few of the numerous cases detailing the "few * * * emergency conditions," *Welsh,* 52 U.S.L.W. at 4584, which will justify a warrantless search of a home. We find that the Creightons' fourth amendment rights and the "exigent circumstances" doctrine were "clearly established" on November 11, 1983.

Anderson has cited no persuasive reason why he could reasonably have been unaware of this clearly established law.

Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR., AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS.

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, ANDJOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

[July 16, 1984]

MEMORANDUM OPINION AND ORDER

Plaintiffs, Robert E. Creighton, Jr., and Sarisse Creighton, husband and wife, individually and on behalf of their children, Shaunda and Tiffany Creighton, brought this action for compensatory and punitive damages against the City of St. Paul, six police officers (Officers John DeNoma, Daniels, Ashton, Galeo, Snyder, and Steffan), Federal Bureau of Investigation (F.B.I.) agent Russell Anderson, and others unknown to them. Plaintiffs allege causes of action under 42 U.S.C. §§ 1983 and 1985, the constitution pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,*

403 U.S. 388 (1971), and under the tort theories of intentional infliction of emotional distress, assault and battery, false arrest and imprisonment, and negligence. This action was originally brought by plaintiffs in state court, but was removed to this court by defendant Anderson pursuant to 28 U.S.C. §§ 1346 and 1442. This matter is now before the court upon Anderson's motion to dismiss or for summary judgment and the remaining defendant's motion to remand to state court.

BACKGROUND

On Friday, November 11, 1983, Minnesota Federal Savings and loan on Grand Avenue in St. Paul was robbed by an armed bandit at approximately 3:30 in the afternoon. November 11 was Veteran's Day, a legal holiday on which federal courts and the prosecutors office were closed. Defendant Anderson of the F.B.I. was called and began immediately to investigate the robbery. A description of the robber was obtained from those at the scene. From interviews with others in the neighborhood, police officers obtained a description of the getaway car as burgundy or maroon over silver, possibly a Buick. Others said it was possibly a darker color.

Anderson states he suspected that the robber was Vadaain David Dixon by 6:30 p.m. that day.[1] Anderson was familiar with Vadaain Dixon because he had investigated several other bank robberies committed by Dixon. The description given at the bank matched Dixon in numerous respects—height, weight, build, race, hair, complexion. Anderson also knew that Dixon had jumped bond two days before and that there was an outstanding federal warrent for his arrest. On October 13, 1983, a federal judge released Dixon on bond after he pled guilty

[1] Several days later an accomplice to the robbery, Jeffrey Lynn Barge, was arrested and gave a statement naming Vadaain Dixon as the robber.

to a bank robbery charge and ordered him to reside at the Volunteers of America residence. Dixon stayed at the residence, taking day furloughs, until November 9, 1983, when he failed to return from a day furlough.

To check out his suspicion, Anderson arranged for a photo lineup. The two tellers who had seen the robber each were asked to examine a lineup of six photos at the St. Paul Police Department. Both tellers selected Dixon. The identification was made about 8:00 p.m. on the day of the robbery.

Anderson and defendant Sergeant Galeo of the St. Paul Police Department then pooled their knowledge of Dixon. They knew of a robbery in which Dixon's accomplice pistol-whipped store employees and customers and in which Dixon attempted to run over police officers in a high speed chase. They knew Dixon had admitted using a pistol in previous bank robberies. They also knew of Dixon's family and family connections with his previous crimes: Dixon's wife, Cheryl Dixon, had been his accomplice in previous robberies and had been arrested therefor: his brother Jamie had driven Cheryl and Vadaain to Milwaukee after a previous robbery.

Jamie was supposedly residing at the residence of his mother, Iris Dixon, where the officers then proceeded.[2] The officers arrived at Iris Dixon's between 8:15 and 8:30 p.m. Jamie was there and, at the officers' request, provided a list of siblings with a description of the automobiles they owned. Sarisse Creighton, Vadaain's sister and plaintiff herein, was listed and her automobile described as a red or burgundy Oldsmobile Cutlass.

From his investigations of previous robberies by Vadaain Dixon, Anderson knew Sarisse was Vadaain's sister. He had also been informed that Vadaain's wife

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[2] Of the three houses the officers went to that night, Iris Dixon's, Minnie Dixon's, and the Creightons, Iris Dixon's house was the closest to the St. Paul Police station and to the bank which was robbed.

Cheryl had been residing with the Creightons and that Vadaain had stayed on a daily basis at the Creightons' during his day furloughs from Volunteers of America. See affidavits of Probation Officer William Johnson, ¶¶ 5, 6, and of Russell Anderson, ¶ 12. The officers meanwhile confirmed by computer that the Creightons' owned a maroon or burgundy Oldsomobile Cutlass.

Jamie Dixon also told the officers that Vadaain might be at his grandmother Minnie Dixon's. Minnie Dixon's house was on the way to Creightons' and the officers stopped there at approximately 8:30 p.m. Minnie stated that she had not seen Vadaain.

The officers then left and went to Creightons', arriving at approximately 8:40 p.m. Anderson, Galeo, and DeNoma went to Creightons' front door; DeNoma was in full uniform. The Creightons state DeNoma had a shotgun. When Robert Creighton answered the door, Anderson alleges that DeNoma identified the officers, informed Robert Creighton of the robbery and that they had a warrant to arrest Vadaain. They then entered the home. Anderson alleges that DeNoma and Anderson explained in detail the events of the robbery to Creighton upon entrance and that Creighton did not indicate Vadaain was not there nor did he tell the officers to leave.

Robert Creighton argues that he immediately objected to the officers entering his home without a warrant. He also insists that no one gave any explanation for the entrance and search.

It is undisputed that Sarisse Creighton became very upset and loud when she saw the officers; Anderson's memorandum states she "went berserk" She claims her children were crying and a shotgun was pointed at her. She yelled at her children to run and they were brought back to the house by the officers. Plaintiffs allege one child went to the hospital that night for an arm injury.

It is also undisputed that Robert Creighton was struck in the face by officer DeNoma. Anderson's memorandum states Creighton attempted to grab DeNoma's shotgun and, after three warnings, DeNoma struck him a "single blocking punch in the mouth". Robert Creighton argues that he made no such move to take DeNoma's gun, but was struck in the mouth. Robert Creighton was arrested but ultimately released without being charged. There is no suggestion or allegation that Anderson was involved in any of the alleged violent acts.

DISCUSSION

In passing upon a motion for summary judgment, the court is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences from the underlying facts disclosed in pleadings and affidavits. *Ralph's Distributing Co.* v. *AMF, Inc.*, 667 F.2d 670 (8th Cir. 1981); *Vette Co.* v. *Aetna Casualty & Surety Co.*, 612 F.2d 1076 (8th Cir. 1980). Thus, Anderson must establish his right to judgment as a matter of law; there must be no genuine issue of fact and no room for doubt or controversy.

The key question on this motion is whether Anderson is entitled to qualified immunity pursuant to *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Supreme Court stated:

> [G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., at 818. This objective reasonableness standard is meant to prevent excessive disruption of government and permit resolution of many insubstantial claims on summary judgment without discovery. *Id.*

Based on the undisputed facts and circumstances of this case, Anderson is entitled to qualified immunity pursuant to *Harlow*. Anderson did not violate any clearly established rights of which a reasonable person would have known because he was justified in suspecting Vadaain Dixon was the robber, he had probable cause to believe Vadaain Dixon was in the Creightons' home and exigent circumstances justified search of the Creightons' home without a warrant.

Anderson's conclusion that Vadaain Dixon was the prime suspect was reasonable and justified in light of the description of the robber given by witnesses, Dixon's past robberies and his recent fugitive status, and the selection of Dixon's photo from a photo lineup by the two tellers.

Anderson had probable cause to believe Vadaain Dixon was at the Creighton home for a number of reasons. Probation Officer William Johnson had informed Anderson that Cheryl Dixon, Vadaain's wife, told him she was residing at the Creightons' and that she was using the Creightons' automobile and Iris Dixon's for transportation. Vadaain Dixon also told Johnson that Cheryl was living with the Creightons and that she picked him up by automobile so that they could spend his day furloughs together. Affidavit of William Johnson, ¶¶ 5, 6. Anderson knew Cheryl Dixon had been arrested for acting as Vadaain's accomplice on prior robberies. Finally, Anderson was told by Jamie Dixon that the Creightons owned a red or burgundy Oldsmobile, a car matching the description of the car used in the robbery. This was confirmed by computer shortly before or after Anderson spoke with Jamie Dixon. Anderson affidavit, ¶ 12.

Finally, exigent circumstances existed to justify Anderson's search at the Creighton residence without a warrant. In *Dorman* v. *United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970), the court identified six factors helpful in deter-

mining whether exigent circumstances existed.[3] The Eighth Circuit has applied these considerations in similar circumstances. *See, e.g., United States* v. *Kulcsar,* 586 F.2d 1283, 1287 (8th Cir. 1978). Consideration of these factors here indicates exigent circumstances existed. (1) A grave offense was involved here, armed robbery, and (2) the suspect was reasonably considered to be armed and dangerous based on his past record and fugitive status. (3) As already shown, Anderson had probable cause to believe Vadaain Dixon committed the robbery in question and (4) that he was at the Creighton residence. (5) There was a likelihood that Vadaain Dixon would escape if not swiftly apprehended in that he had just jumped bond, had a vehicle, and money from the robbery to finance his flight. (6) The initial entry into the Creighton home was peaceful. The alleged violent acts occurred after entry.[4]

Other factors further justify Anderson's search without a warrant. Warrantless entry has been held justified because of the officer's fear that the evidence thought to be inside would be destroyed if he waited to get a warrant. *See, e.g., United States* v. *Eddy,* 660 F.2d 381 (8th Cir. 1981). Here, Anderson knew the robber had a weapon, bait money, and clothing, all of which he could have disposed of in a short period of time.

Anderson also was in hot pursuit of the suspect, another circumstance justifying warrantless search. *See Warden* v. *Hayden,* 387 U.S. 294 (1967): *United States* v. *Easter,* 552

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[3] These considerations are: (1) that a grave offense is involved; (2) that the suspect is reasonably believed to be armed; (3) that a clear showing of probable cause exists to believe the suspect committed the crime in question; (4) that there is strong reason to believe the suspect is in the premises being entered; (5) that a likelihood exists that the suspect will escape if not swiftly apprehended; and (6) that the entry, though not consented to, is made peacefully. *United States* v. *Kulcsar, supra* at 1287.

[4] The court again notes that there is no suggestion or allegation that Anderson was involved in the alleged violent acts.

F. 2d 230 (8th Cir.), *cert. denied,* 434 U.S. 844 (1977). He did not stop working on the case from his first call through and including the Creighton search. Positive identification of Vadaain Dixon by photo lineup occurred at about 8:00 p.m., entrance into the Creighton home at approximately 8:40 p.m. The officers first went to the family residence closest to their police station. They thought they could find James Dixon there who had assisted Vadaain in leaving town after a previous robbery. There they learned and confirmed that the Creightons owned a car matching the description from the robbery. They then went to Minnie Dixon's residence which was on the way to Creightons and where Jamie had said Vadaain might be. They quickly left there and proceeded to the Creighton residence. For all of these reasons based on undisputed facts, the warrantless search of the Creighton residence would appear to be reasonable and justified.

Pursuant to the proceeding analysis based on the undisputed facts in this case, Anderson is entitled to qualified immunity under *Harlow.*[5] Because this immunity applies to all aspects of the complaint against Anderson, his motion for summary judgment should be granted. The court has not been asked to and does not make any findings concerning the other defendants.

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[5] Because Anderson's actions were correct in light of the law on warrantless search, the court need not consider Anderson's argument that that law was not clearly defined at the time of the events and that he therefore could not be held to have violated a "clearly established" constitutional right under *Harlow.*

Plaintiffs filed an offer of proof of facts thay feel they could establish if allowed "adequate time for discovery". Even if proven, however, the four facts listed in the offer of proof are no barrier to summary judgment here. It is irrelevant to this motion what the St. Paul paper reported, whether a policeman asked a neighbor about a car with a yellow license plate, or the fact that the F.B.I. did not search the home of Cheryl Donlin's (Dixon's) father.

Additional grounds exist for summary judgment on plaintiffs' claims against Anderson under sections 1983 and 1985. Section 1983 requires that the defendant acted under color of state law. Anderson, however, was a federal officer acting under federal law. The Creightons failed to allege any conspriacy to tie Anderson in with the non-federal officials, and no facts have been advanced to support such an allegation. Similarly, the Creightons failed to allege the requisite class-based animus in their claim based on section 1985.

The remaining named defendants have moved to remand this case to Ramsey County District Court upon a dismissal of claims against Anderson. Counsel for the Creightons stated they would have no objection to such remand if Anderson's summary judgment motion were granted. Accordingly, remand to state court is appropriate.

Finally, the Creightons moved to strike the affidavit with exhibits of Assistant United States Attorney Don M. Hopeman on the apparent grounds that it is irrelevant and prejudicial. Hopeman stated he had no objection to this motion and it is granted.

ORDER

Accordingly; based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that

1. The motion of defendant Anderson for summary judgement is granted.

2. The motion of the remaining defendants for remand of the remaining claims to state court is granted.

3. Plaintiff's motion to strike the affidavit with exhibits of Don M. Hopeman is granted.

DATED: JULY 16, 1984.

/s/ Diana Murphy

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5150-MN

ROBERT E. CREIGHTON, JR., ET AL., APPELLANTS,

v.

RUSSELL ANDERSON, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

OCTOBER 15, 1985